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No. 4.

Brief of Barber for D. E.

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Supreme Court of the United States.

OCTOBER TERM, 1899,
No. 4.

DANIEL WILEY,
Plaintiff in Error,

vs.

L. SINKLER, T. D. LANIGAN AND BENJAMIN ELFE,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF FOR DEFENDANTS IN ERROR.

WILLIAM A. BARBER,
Attorney for Defendants in Error.

The Evening Post Job Printing House, New York.

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In Error to the Circuit Court of the United States for the District of South Carolina.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

The plaintiff in error and the defendants in error are all citizens of the State of South Carolina. On the 11th day of March, 1895, the plaintiff in error filed in the Circuit Court of the United States a complaint against the defendants in error, seeking to recover against them damages for an alleged refusal on their part, while they were acting as managers of election, to allow plaintiff in error to vote in an election, held on the sixth day of November,

1894, for member of the House of Representatives of the United States. The defendants in error duly filed their answer to the complaint.

When the case was called for hearing the defendants interposed an oral demurrer on two grounds: First, That the Court had no jurisdiction of the case. Second, That the complaint did not state facts sufficient to constitute a cause of action. After hearing argument, the Circuit Judge sustained the demurrer on the second ground and did not consider the first. The plaintiff in error filed seventeen assignments of error, upon which the case was brought to this Court.

ARGUMENT.

Objection to the complaint by oral demurrer was taken in accordance with the practice under the Code of Procedure of South Carolina and the rules of the Circuit Court in that State.

Section 164 of the South Carolina Code: "The only pleading on the part of the defendant is either a demurrer or answer."

Section 165: The defendant may demur to the complaint when it shall appear upon the face thereof either:

I.—That the Court has no jurisdiction of the person of defendant or the subject of the action; or

II.—That the plaintiff has not legal capacity to sue; or

III.—That there is another action pending between the same parties for the same cause; or

IV.—That there is a defect of parties plaintiff or defendant; or

V.—That several causes of action have been improperly united; or

VI.—That the complaint does not state facts sufficient to constitute a cause of action.

Section 168: When any of the matters enumerated in Section 195 do not appear upon the face of the complaint, the objection may be taken by answer.

Section 169: If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Rule 18 of the Rules of Practice for Circuit Court in South Carolina is as follows:

"A motion to dismiss a complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action, or the answer does not state facts sufficient to constitute a cause of action, must be in writing, stating wherein the pleading objected to is insufficient."

In the outset the attention of the Court is called to the fact that Sections 5311 and 5514 inclusive, Revised Statutes of the United States, as well as Section 2008 of the said statutes, have been expressly repealed by the Act of Congress of February 8, 1894 (statutes of 1893, 1894, Chapter XXV., p. 36). Therefore, so much of the briefs heretofore filed as refers to these sections can have no bearing on the decision of this case, and the principles governing it must be found elsewhere.

FIRST PROPOSITION.

The Circuit Court is without jurisdiction, because no federal question appears on the face of the complaint.

This ground of demurrer was not considered by the Court below, but as it is incumbent upon this Court to inquire into the jurisdiction in all cases, it is deemed proper to discuss it. Jurisdiction must appear affirmatively upon the record.

In the case of Parker *v.* Ormsby, 141 U. S., this rule was again stated by the Court. Mr. Justice Harlan delivering the opinion says: "Did the Court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the Court below. In the exercise of its power, this Court, of its own motion, must deny the jurisdiction of the Courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act" (*Mansfield C. & L. M. R. R. Co.* v. *Swan*, 111 *U. S.*, 379, 382; *King Bridge Co.* v. *Otoe County*, 120 *U. S.*, 225, 226; *Cameron* v. *Hodges*, 127 *U. S.*, 322, 325).

Further, it is the settled doctrine of this Court that the inquiry into the jurisdiction of the Circuit Court is limited to the facts appearing on the record in the first instance (*Colorado Mining Co.* v. *Turck*, 150 *U. S.*, 143; *State of Tenn. et al.* v. *Union Planter's Bank et al.*, 152 *U. S.*, 453).

The only semblance of a Federal question alleged is in paragraph I. of the complaint as follows:

"That under the Constitution and laws of the said State of South Carolina and the Constitution and laws of the United States, the said plaintiff is and was at the time aforesaid twenty-one years of age, and is and was in every other respect a

duly qualified elector of said State, and is and was on the said 6th day of November, 1894, entitled to vote for a member of the House of Representatives of the United States from said State of South Carolina."

Does this allege a Federal question? Suppose plaintiff was a duly qualified elector, entitled to vote for a member of the House of Representatives of the United States, there is no allegation that any qualification is fixed by the Federal Constitution, or that any right guaranteed by the Constitution has been infringed. In fact, no such allegation could be made. His qualification as an elector depends on the State Constitution and statutes.

Congress has not vested in the Circuit Court jurisdiction to try this case, unless it arises under the Constitution and laws of the United States.

"The Constitution of the United States does not confer the right of suffrage upon any one."

Minor *v.* Hapersett, 21 Wall., 162.
United States *v.* Reese, 92 U. S., 214.
United States *v.* Cruikshank, 92 U. S., 542.
Neal *v.* Delaware, 103 U. S., 370.
Ex parte Yarborough, 110 U. S., 651.

The right of suffrage is a privilege which the elector enjoys under the Constitution and laws of his State.

In United States *v.* Cruikshank *et al.*, 92 U. S., 549, the Court said: "We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the other and each has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. The same person may be at the same time a citizen of the United States and a citizen of the State, but his rights of citizenship under one of these governments will be different from those he has under the other." Citing Slaughter House cases, 16 Wall., 74.

In the Slaughter House cases Mr. Justice Miller said:

"If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of a State, as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment."

The expressions used in the Slaughter House cases become more significant in view of the unanimous decision of the Court in Minor *v.* Hapersett, 21 Wall., 163, with Mr. Justice Miller sitting as a member of the Court. In that case it was held that "Neither the Constitution nor the 14th Amendment made all citizens voters." Mr. Chief Justice Waite, delivering the opinion of the Court, said: "The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters."

It is well settled by a long line of decisions that the constitutional guaranty is not of the right to vote, but of exemption from discrimination on account of race, color or previous condition. This guaranty against discrimination is the only new constitutional right vested in citizens of the United States by the Fourteenth and Fifteenth Amendments.

United States *v.* Reese *et al.*, *supra.*

In United States *v.* Petersburg Judges of Election, I. Hughes, C. C. R. 94, Judge Bond, Circuit Judge, held:

"The Fourteenth and Fifteenth Amendments do not affect the right of a State to define the rights of citizenship; nor does it draw in the jurisdiction of the Circuit Court of the United States the question of the invasion of the rights of persons or property as such."

Judge Hughes, District Judge, in the same case held:

"The Federal courts have no jurisdiction to protec- rights which accrue from the citizenship of a State, but only such as accrue from citizenship of the United States. The right to vote belongs to the fort mer class. It is not a natural or inherent right, but a privilege conferred or withheld by the several States in their own discretion. The only guarantee of the United States in this connection is under the Fifteenth Amendment, that no State shall deny or abridge the privilege on account of race, color or previous condition. The only case in which the Federal courts can entertain jurisdiction of any question upon this right is when violation of this guarantee is alleged."

In the conclusion of his opinion he says:

"If the indictment had charged that the denial of the right had been on account of race, color or previous condition; or if after charging the denial, it had been alleged that he was prevented from voting for a Member of Congress, or electors of President, I am inclined to think the offense would have been cognizable here. But a charge merely that a citizen of the United States was denied registration, without other allegations to make it appear some right was abridged, which belonged to the man as a citizen of the United States, is not sufficient to give cognizance of the offense to this Court."

In *United States* v. *Crosby et al.*, 1 *Hughes* 456, *Judge Bond held:*

"The right of a citizen to vote depends upon the laws of the State in which he resides, and is not granted to him by the Constitution of the United States, nor is such right guaranteed to him by that instrument. All that is guaranteed is that he shall not be deprived of the suffrage by reason of his race, color or previous condition of servitude."

"The true interest of the people of this country requires that both the National and State Governments should be allowed, without jealous interference, on either side, to exercise all the powers which respectively belong to them according to a fair and

practical construction of the Constitution. States rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other."

Ex Parte Siebold, 100 U. S., 394.

The case of *Ex parte* Yarborough is cited by counsel for plaintiff in error at page 42 of his brief, but it does not sustain the principle for which he contends. Granting that the right to vote for a member of Congress depends primarily on the Constitution of the United States, we cannot accede to the ingenuous argument by which counsel for plaintiff in error seeks to engraft certain parts of the State Constitution on the Constitution of the United States, ignoring the statutes of the State enacted pursuant to the Constitution. Nor do we concede the proposition, "that the qualification of State electors are purely and exclusively constitutional." Referring again to the case of *Ex parte* Yarborough, *supra,* we call attention to the connection in which the quotation in plaintiff's brief is used. The Court says:

"This proposition answers also another objection to the constitutionality of the laws under consideration, namely: That the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the laws of each State respectively."

"If this were conceded, the importance to the general government of having the actual election, the voting for those members, free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the laws of the State where he votes. It equally affects the government; it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by

the law of the United States, or by their united result."

"But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election."

Its language is: "The House of Representatives shall be composed of Members chosen every second year by the people of the several states, and the electors in each state shall have the same qualifications requisite for electors of the most numerous branch of the State Legislature" (Article I, Section II). The States in prescribing the qualifications of voters for the most numerous branch of their own Legislature do not do this with reference to the election for Members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualifications thus furnished as the qualification of its own electors for Members of Congress."

"It is not true, therefore, that electors for Members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State."

If we would read into Section 2, Article I., of the Federal Constitution, the qualifications for electors for Members of Congress in the State of South Carolina, we must insert all the provisions of the South Carolina Constitution and statutes determining the qualifications for electors of the most numerous branch of the State Legislature.

The State Constitution of 1868, in fixing the right of suffrage, provided in Article 8, Section 3: "It shall be the duty of the General Assembly to provide from time to time for the registration of all electors." Pursuant to this power, the General Assembly enacted a system of registration laws, carefully

guarding against any encroachment upon the Federal Constitution.

Section 131 of the Revised Statutes of South Carolina is as follows: "Every male citizen of the United States of the age of twenty-one years and upward, not laboring under the disabilities named in the Constitution, without distinction of race, color or former condition, who shall have been a resident of the State for one year, and in the county in which he offers to vote for sixty days next preceding any general election, shall be entitled to vote: Provided, That no person while kept in any alms house or asylum, or or of unsound mind, or confined in any public prison, or who shall have been convicted of treason, burglary, larceny, perjury, forgery or any other infamous crime or dueling, shall be allowed to vote."

Section 132 *is as follows:*

"All electors of the State shall be registered; and no person shall be allowed to vote at any election hereafter to be held, unless he shall have been heretofore registered in conformity with the requirements of Chapter VII. of the General Statutes of 1882, and acts amendatory thereof, or shall be registered as herein required."

These then furnish the qualifications requisite for electors of the most numerous branch of the State Legislature, and under Article I., Section 2 of the Federal Constitution are the measure of electors for a member of Congress.

The complaint in this case does not and cannot allege that any qualification is fixed by the Federal Constitution. Nor is there any allegation that any right guaranteed by the Constitution and laws of the United States has been infringed.

The Circuit Court is therefore without jurisdiction.

SECOND PROPOSITION.

The complaint does not state facts sufficient to constitute a cause of action.

Section 163 of the Code of South Carolina is as follows:

"A complaint shall contain a plain and concise statement of facts constituting a cause of action, without unnecessary repetition."

In construing this ~~action~~ section, the Supreme Court of South Carolina held in case of Chalmers *v.* Glenn, 18 S. C., 481: "Thus generally it may be said that a cause of action exists when the legal rights of one party are invaded by another. It follows, therefore, that he (the plaintiff) must allege in his complaint all the facts showing his right, and also showing its invasion by the defendant; and the facts thus alleged must in law, upon their face on the one side, entitle him to the right which he claims, and on the other amount to an invasion by the defendant."

If the Circuit Court has jurisdiction, then the facts necessary to a recovery and to be stated in the complaint are:

I.—That the plaintiff was duly qualified and entitled under the Constitution and laws of the United States to vote at the Congressional election in South Carolina, and that he furnished defendants with sufficient evidence of such qualification.

II.—That the defendants willfully and maliciously denied him this right.

III.—That the acts were committed within the jurisdiction of the Court.

FIRST.—It is not stated that the action arises under the Constitution or laws of the United States, or that any right, title, privilege or immunity on which the remedy depended has been denied him in contravention of the Federal Constitution or laws.

SECOND.—The complaint contains no allegation of malice or corruption on the part of the defendants.

In most of the States where managers of election have been held liable in damages to an elector whose vote is refused, it has been on proof of malice or corruption.

The leading case is that of Jenkins *v.* Waldron, II. Johnson (N. Y.), 114. This case is based upon the doctrine laid down in the English case of Ashby *v.* White, 2 Ld. Rayn, 938. Justice Spencer, in delivering the opinion in Jenkins *v.* Waldron, says: "The principal case relied on by counsel is that of Ashby *v.* White. There the declaration alleged that the rejection of Ashby's vote was done fraudulently and maliciously, and although the jury found the defendant guilty, the judgment was arrested. This judgment was afterwards reversed in the House of Lords. The first resolution of the Lords states: 'That by the known laws of this Kingdom, any freeholder or other person having the right to give his vote at the election of members to serve in Parliament, and being wilfully denied or hindered to do so by the officer who ought to receive the same, may maintain an action in the Queen's Court against such officer, to assert his right and to recover damages for the injury.' The case of Harrison *v.* Tappenden, I. East., 555, clearly shows that this action is not maintainable without stating and proving malice, express or implied, on the part of the officers. In the case in the text, Lawrence, *J.*, said there is no instance of an action of this sort maintained for an act arising from merely error of judgment."

Brightly's Leading Cases on Election, p. 192.

McCrary on Elections, Section 494, says: "The general rule is that an officer of election or of registration, who shall wilfully and corruptly refuse to any citizen who is duly qualified the right to vote or register, is liable in damages to the person injured. In several of the States it is regarded as sufficient to show that the plaintiff has been unlawfully deprived of his right without proof of a malicious or corrupt purpose on the part of the officer; but the general doctrine is as above stated. In those States where no proof of malice is necessary the plaintiff must allege and prove that he furnished defendants with sufficient evidence of his having the legal qualifications of a voter before defendants refuse to receive his vote.

This decision comes almost up to the rule as it exists in most of the other States, because if the voter furnished sufficient evidence of his right, that fact would go far to prove willfulness on the part of the officer who, in the face of such evidence, refuses him the privilege of voting."

The allegation in the complaint is:

IV.—"That the said defendants unlawfully, willfully and injuriously refused to permit the said plaintiff to vote at said precinct, and at said Federal election, which was there held according to law on said 6th day of November, 1894, for one of the candidates for Member of said House of Representatives of the United States for the State aforesaid, and wrongfully and willfully, and without any lawful cause or excuse, rejected the plaintiff's said vote, to his damage two thousand and five hundred dollars."

This allegation does not charge that the act done by the defendants was done "*willfully* and *wantonly*," as stated in the brief for plaintiff in error (p. 3).

"In those States where no proof of malice is necessary, the plaintiff must allege and prove that he furnished defendants with sufficient evidence of his having the legal qualifications of a voter before defendants refused to receive his vote" (McCrary on Elections). This complaint has no such allegation.

The averment is: "and plaintiff further avers that he then and there had ready the proof of his qualifications as such Federal elector, as aforesaid." "*He then and there had ready the proof.*" Did he offer it to the defendants? The complaint does not so state. There is no allegation that the defendants even knew that he was an elector. His statement might be true, even had he refused to furnish them the proof of his qualification, while he held in his pocket a registration certificate. His complaint needs this material allegation.

We, therefore, conclude that the complaint should either allege malice and corruption or show that the plaintiff offered defendants proof of his qualification as an elector before his vote was refused.

THIRD.—The complaint does not state that the plaintiff was duly registered as an elector under the laws of South Carolina. It was upon this ground particularly that the Circuit Court sustained the demurrer.

Counsel for plaintiff in error, on page 5 of his brief, says: "If the registration law of South Carolina be valid and subsisting, then the ground upon which the Circuit Judge sustained the demurrer is sound." Pages 5 to 32, inclusive, of his brief are devoted to an attack upon the Registration Act of 1882, which was in force at the time the plaintiff in error alleges that he was denied the right to vote. Without conceding the question of jurisdiction or admitting that to sustain the dismissal of the complaint, it is necessary to establish the validity of the whole registration system, we submit that the registration law of South Carolina is not in contravention of the Constitution of the State and of the United States.

"In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power, as it rests in and may be exercised by

the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative power, but is intrusted with general authority to make laws at discretion."

Cooley Const. Limit. (*Ed. 6th*), 104.

Again (on p. 105), he quotes approvingly the language of Chief Justice Draper, that "Plenary power in the legislature for purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden."

Again, on page 192, discussing "the circumstance under which a legislative enactment may be declared unconstitutional," Judge Cooley says:

"Nor can a Court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the Constitution" (*Const. Limit.*, *6th Ed.*, 197). Mr. Sedgwick, in his work on Statutory and Constitutional Law, says:

"Constitutional provisions may be ambiguous; the doctrine of interpretation is vague; but these branches of judicial authority are subject to some test, and can be circumscribed within some limits. But who will undertake to decide what are the principles of eternal justice, and who can pretend to fix any limits to the judicial power, if they have the right to annul the operations of the Legislature on the ground that they are repugnant to natural rights? There may be, there always will be, questions, not only as to the expediency, but as to the justice of laws. But questions of public policy and State necessity are not meant to be assigned to the domains of the Court. The right of construction, the right of applying constitutional restrictions, are vast powers, which it will always require great sagac-

ity and intelligence to exercise. Let the judiciary rest contented with its acknowledged prerogatives, and not attempt to arrogate an authority so vague and so dangerous as the power to define and declare the doctrines of natural law and abstract right in the construction of statutes" (*Sedg. on Stat. and Con. Law*, 182).

This doctrine is adhered to by Chief Justice Fuller in N. Y. & N. E. R. R. Co. *v.* Bristol, 151 U. S., 570.

The right to vote is not an inherent or absolute right found among those generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the Federal Constitution, the elective franchise is under the control of the sovereign power of the State, expressed in constitutions or statutes properly enacted. When a constitution has conferred the right and prescribed the qualifications of electors it, of course, is paramount until amended and the Legislature cannot change or add to them in any way. But when the Constitution does not fix the right of suffrage or prescribe the qualifications of voters it is competent for the Legislature to do so. These principles are well established.

It is equally well settled that the power to provide for the orderly exercise of the right of suffrage, which belongs to the State Legislature, includes the power to enact registry laws, and to prohibit from voting persons not registered. Such laws do not add to the constitutional qualifications of voters. *State* v. *Dillon*, 14 *Southern R.*, 394.

In the case of Keenen v. *Wells*, 144 *Mass.*, 497, *the Court held:*

" However unjust, unwise or even tyrannical such regulations may be, or seem to be, the right of each State to define the qualifications of its electors is complete and perfect, except so far as it is controlled by the 15th Amendment to the Constitution of the United States."

Judge Cooley in his work on Constitutional Limitations, 752, says:

"The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage is left by the National Constitution to the several states. Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of public policy; the prevailing opinion being that it should be as general as possible consistent with public safety."

Let us again quote from the Constitution of South Carolina, Section 2, Article 8, referring to the qualifications of electors. It is as follows:

"Every male citizen of the United States of the age of twenty-one years and upwards, not laboring under the disabilities named in this Constitution, without distinction of race, color or former condition, who shall be a resident of this State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the County in which he offers to vote sixty days next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people and upon all questions submitted to the electors at any elections: Provided, That no person shall be allowed to vote or hold office who is now or may hereafter be disqualified therefor by the Constitution of the United States until such disqualification shall be removed by the Congress of the United States: Provided, further, That no person while kept in any almshouse or asylum, or of unsound mind, or confined in any public prison, shall be allowed to vote or hold office."

Section 3, Article 8, is as follows:

"It shall be the duty of the General Assembly to provide from time to time for the registration of all electors."

In pursuance of these two constitutional provisions, the Legislature has enacted the following law found in the Revised Statutes of 1893, Sections 131 and 132, which are as follows:

"Every male citizen of the United States of the age of twenty-one years and upwards, not laboring under the disabilities named in the Constitution, without distinction of race, color or former condition, who shall have been a resident of the State for one year, and in the county in which he offers to vote sixty days next preceding any general election, shall be entitled to vote: Provided, That no person while kept in any almshouse or asylum, or of unsound mind, or confined in any public prison, or who shall have been convicted of treason, murder, burglary, larceny, perjury, forgery, or any other infamous crime, or duelling, shall be allowed to vote."

Section 132. "All electors of the State shall be registered and no person shall be allowed to vote at any election hereafter to be held unless he shall have been heretofore registered in conformity with the requirements of Chapter VII. of the General Statutes of 1882, and Acts amendatory thereof, or shall be registered as herein required."

It will be observed that Section 132 provides that the elector shall register according to the registration laws enacted, to entitle him to vote.

Section 3, Article 8, of the Constitution is mandatory. The Legislature is left no discretion in the matter of the registration of electors. Besides, it provides that from time to time provision shall be made for this registration.

This section leaves the whole subject of the regulation of election by the enactment of registration laws to the General Assembly, and it is alone the judge of the requirements of such registration laws and from its decision there can be no appeal.

Section 90 of the General Statutes of 1882, prescribing that no one shall vote without registering under the laws enacted was not only in consonance with the provisions of the Constitution, but carried out the positive mandate in the manner intended.

It will be observed that in States, in which it has been held that registration laws which necessarily restrain, impair, or impede the right of suffrage were invalid, there was no authority, either discretionary or mandatory, in their Constitutions to

enact registration laws, and those passed were enacted under the power included in the general power of the Legislature to provide for the orderly exercise of the right of suffrage, such as fixing the time, place and manner of elections, &c.

The real question in *Capen* v. *Foster*, cited in brief for plaintiff in error, was whether, under the inherent general power of the Legislature to provide for an orderly election, the power to enact registration laws *per se*, was not in violation of the Constitution, when no authority was conferred by that instrument to enact such laws.

In *Munroe* v. *Collins*, 17 Ohio, 665, also cited by counsel for plaintiff in error, the doctrine is announced:

That when this general power is exercised by the Legislature of enacting registration laws, they should facilitate rather than impede the right of suffrage; and sustains the doctrine of the Massachusetts case, that registration laws could be enacted in the exercise of this general power.

In Paige v. *Allen*, 58 *Penn.*, 338, the same doctrine was announced as in the Ohio case, and in *Pattison* v. *Barlow*, 60 *Pa.*, 75, the same doctrine was announced, and a registration law was held constitutional as having been enacted under this general power.

In Edmunds v. *Bamberry*, 38 *Iowa*, 267; *and in Woods* v. *Baker*, 38 *Wis.*, 71, *the same doctrine* was held.

In the case of Kenneen v. *Wells*, 144 *Mass.*, 894, the same doctrine was held reaffirming *Capen* v. *Foster*.

A careful examination of all these cases will show that the Constitution of these States did not confer special, express power upon the Legislatures to pass registration laws, but they were enacted under the

general power to provide orderly elections by fixing place, time and manner of holding the same.

But the registration law of South Carolina stands on an entirely different basis. It was not only enacted in the performance of a duty commanded by the Constitution, but in the exercise of a power especially conferred—the manner of the exercise of the power being left entirely to the Legislature. It is left as the sole judge of the provisions of such registration laws, and when such a law is enacted its reasonableness cannot be questioned. This case then can be differentiated from all the cases upon which the courts have passed upon registration laws. They were cases in which the laws were passed under the general power to provide for orderly elections. This is a case in which not only this power was exercised but the superadded power conferred by the Constitution of South Carolina to enact such registration laws as the Legislature sees fit.

The Constitution of Florida contains substantially the same provisions in reference to registration system as are found in the Constitution of South Carolina. In the recent case of *State* v. *Dillon*, 14 Southern R., 394, it was held that the Legislature of Florida was the sole judge of the reasonableness of the registration law passed in pursuance of the authority conferred by the Constitution.

In North Carolina the Constitution confers this special power to enact such laws.

In the case of State v. *Scarboro*, 14 *S. E. R.*, 736 (*N. C.*), a registration law was held valid and constitutional which required the applicant to give his age, occupation, place of birth, place of residence, as well as the township from which he removed, and his full name, &c., the Judge delivering the opinion says:

"In the case at bar we have a reasonable statutory requirement that the elector shall place upon the registration books certain facts connected with his own history, in order that opportunity may be given to look into the grounds for challenge, and

thereby prevent illegal voting, or, that the Court may detect and punish crime if it becomes a fact accomplished."

Upon these principles it is submitted that the registration acts of 1882 were valid and binding on the plaintiff in error, and every other citizen of South Carolina attempting to cast his ballot in the election held on the 6th day of November, 1894.

After considering the sections of the General Statutes of 1882 relating to registration, counsel for plaintiff in error at page 33 of his brief, says:

"*Now, what of the Act of* 1894? *Will it stand the test of constitutional inquiry?*"

Neither these questions nor the pages of argument answering them, which practically cover the remainder of his brief, are in any way relevant to this case.

The alleged acts of the defendants upon which this suit is based were committed at an election held on the 6th day of November, 1894 (Transcript, fol. 2).

The Act of 1894 referred to by counsel is an Act of the General Assembly entitled, "An Act to provide for calling a Constitutional Convention, to provide the number and qualification of members of the convention, their compensation, &c., and to provide for the election of the same, and to define and prescribe the qualification of electors and the manner of election and of declaring the result," approved 24th day of December, 1894, *more than six weeks after the date of the election in question*, and the system of registration therein provided related exclusively to the registration of electors at the election for members of a Constitutional Convention.

Is further statement necessary? Counsel seems to have anticipated that we would urge the Act of

1894 upon this Court. Nothing could be more absurd, and to appropriate his language (brief, p. 35), "Life is too short and time too fleeting to reason with such unreason."

On page 45 it is stated, "that the tortious act complained of was committed while the Acts of 1882 and 1894 were upon the statute books." This is but restating the error already made. The Act of 1894 was subsequently passed.

The supposition that we would have aught to say about the State Constitution of 1895 or the Act of March 5, 1896, is no less erroneous than the statement just referred to.

The Act of December 24, 1894, the State Constitution of 1895, and the Act of March 5, 1896, are all wholly irrelevant to the issue in this case. Referring to all of them, if we may again appropriate the language of opposing counsel, we would use his concluding words and say: "The issues as to the new law that may arise upon a proper case made are not for us to suggest or argue, nor for this Court, in this cause, to consider and adjudicate."

WM. A. BARBER,
For Defendants in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

DANIEL WILEY, Plaintiff in Error,

vs.

D. L. SINKLER, T. D. LANIGAN and BENJAMIN ELFE.

No. 4.

The Registration Law of South Carolina, Embodied in the Revised Statutes of 1893.

CHAPTER VIII.

SECTION 131. Every male citizen of the United States of the age of twenty-one years and upwards, not laboring under the disabilities named in the Constitution, without distinction of race, color or former condition, who shall have been a resident of the State for one year, and in the county in which he offers to vote for sixty days next preceding any general election, shall be entitled to vote: Provided, That no person while kept in an almshouse or asylum, or of unsound mind, or confined in any public prison, or who shall have been convicted of treason, murder, burglary, larceny, perjury, forgery or any other infamous crime, or dueling, shall be allowed to vote.

SECTION 132. All electors of the State shall be registered; and no person shall be allowed to vote at any election hereafter to be held unless he shall have been heretofore registered in conformity with the requirements of Chapter VII of the General Stat-

utes of 1882, and Acts amendatory thereof, or shall be registered as herein required.

SECTION 133. On or before the first day of March, in every second year, reckoning from 1882, the Governor shall appoint, by and with the advice of the Senate, if in session, and if not in session, subject to its approval at its next session, and subject to removal by the Governor, by and with the advice and consent of the Senate, one competent and discreet person in each county, who shall be a qualified voter thereof, and who shall hold his office at the county seat, and shall be known as the Supervisor of Registration of such county, and whose duty it shall be to supervise the registration of the electors of such county as herein specified. He shall keep a record of all his official acts and proceedings. The term of his office shall be for two years from the date of his appointment; he shall continue in his office until his successor shall be appointed and shall qualify; and his compensation shall be fixed by the General Assembly from time to time as may be deemed proper. His accounts for advertising (and in the County of Charleston, and rents for registration precincts also) and for stationery shall be audited and paid by the County Commissioners of his county.

SECTION 134. The Governor is authorized to appoint a deputy supervisor in case of the inability of the supervisor to act, who, when so appointed, shall have all the powers and be charged with the duties of the supervisor, and shall receive five dollars per diem when actually employed.

The Governor shall also appoint two assistant supervisors of registration who shall serve without compensation, and shall sit with the supervisor of registration in the determination of all cases of contested registration in which the supervisor shall refuse to register the applicant; the three supervisors shall sit for as many days, beginning on the second Tuesday in July, as may be necessary to hear and determine all such contested cases.

SECTION 135. The Secretary of State shall cause to be prepared a sufficient number of registration books and blanks, so

that there shall be two of said books for each precinct in each county, which books shall be ruled in columns, with proper headings, so as to indicate the name, age, occupation and place of residence of each elector, with a separate column to the right side of the page for such entries as may be necessary. And the secretary is authorized and required to provide additional registration books to supply the place of such as have become defaced and injured by use at the elections heretofore had, and he shall furnish the same upon application of any supervisor certifying to the necessity thereof. And in such case the supervisor so procuring such additional registration books shall copy from the original book the names and record thereof into the new book; and when the same shall be so copied it shall be the duty of the County Auditor and clerk of the Court of Common Pleas of the county, together with the supervisor, carefully to compare the names and record in the new book with those in the book so injured or defaced; and if the same is found correct to certify to its correctness; and such new book shall not be used at any election unless so certified.

SECTION 136. For the purpose of registration, each township, as now laid out and defined, and in those counties where there are no such townships, the parish, as formerly known and defined, is declared a registration precinct. In the City of Columbia each ward shall be a registration precinct, and in the City of Charleston the registration precincts shall be the same as the voting precincts now established in the several wards of said city, as designated and defined in section 158.

SECTION 137. After every general election the registration books shall be opened for registration of such persons as shall thereafter become entitled to register, on the first Monday in each month, until the first day of July preceding a general election, when the same shall be closed until such general election shall have taken place.

SECTION 138. It shall be the duty of the supervisors of registration to deposit said books in the office of the Clerk of Court of

Common Pleas in their respective counties, except in the counties of Charleston and Greenville, where they shall be deposited in the office of the Register of Mesne Conveyance; and it shall be the duty of the clerk of said court and the Register of Mesne Conveyance to safely keep the same together with the other books of record in their respective offices; and it shall be unlawful for any person or persons to remove the same from the said offices, except the supervisors, who are hereby authorized to take the same from said offices when it shall be necessary in the discharge of the duties imposed upon them by this chapter.

SECTION 139. The supervisor shall determine as to the legal qualifications of all applicants for registration by summary process, requiring oath, evidence, or both, if he deem proper, subject to revision by the assistant supervisors and himself in all cases where he has refused to register an applicant. From their decision any applicant who is rejected shall have the right to a review thereof by the Circuit Court, provided he give notice in writing to the supervisor of his application for such review, and the grounds thereof, within five days from the date of his rejection, and commence his proceedings within ten days from the service of said notice.

SECTION 140. Any person coming of age and otherwise qualified as an elector, may appear before the supervisor on any day on which the books are opened, as aforesaid, and make oath (which the supervisor is hereby authorized to administer) as to his name, age, occupation and place of residence; and if the supervisor find him qualified he shall enter his name upon the registration book of the precinct in which he resides. Such persons shall have the right of appeal, as provided in the last section, if the supervisor shall not find him qualified.

SECTION 141. In case a person shall not be of age to qualify him as an elector on the day of the closing of the books of registration before any general election, but shall be of such age as will qualify him as such elector before the said general election, and shall appear before the supervisor of registration and take

oath thereto, the supervisor, if he shall find him qualified, shall enter his name upon the registration book as aforesaid.

SECTION 142. Each elector registered as aforesaid shall thereupon be furnished by the supervisor with a certificate which shall contain a statement of his age, occupation and place of residence as entered in the said registration book, and which certificate shall be signed by the said supervisor, and no person shall be allowed to vote at any other precinct than the one for which he is registered, nor unless he produces and exhibits to the managers of election such certificate: Provided, In case there shall be no election precinct within any township or parish, the supervisor shall designate in the certificate at which of the neighboring precincts the elector shall vote; and in case there be more than one precinct in any township or parish the supervisor shall likewise designate in the certificate at which of the said precincts the elector shall vote. The certificate of registration shall be of the following form:

"Registration Certificate Number——, ——County, ———— Township or Parish, Election Precinct———————— The bearer, ————————————, is a qualified voter in the above precinct, and resides at————————in———————— Township, or ————————————Parish, and is———years of age and entitled to vote at said precinct. Registered on the ———day of————————A. D., 18—.

————————————————

Supervisor of Registration."

SECTION 143. Whenever a new polling precinct is established by law, it shall be the duty of the supervisor to transfer from the books of registration the names of such qualified voters registered at other precincts as should, under this section, register and vote at the new precinct so established, and who may request such transfer, and to make such changes as may be necessary in the certificates of registration issued to such voters, who shall

thereafter vote only at the precincts to which they have been thus transferred.

SECTION 144. When one polling place has been changed to another in any township, or where the name of the polling place has been changed since the last general election, the registration of voters for the former polling place shall be valid and effectual for the new polling place or precinct; or where one or more additional polling places or precincts have been established in the same township, or where a new precinct has been established in a township which formerly had none, it shall be the duty of the supervisor to change the certificates of registration of voters entitled by proximity of residence to vote at such new precinct, requiring in every case a surrender and cancellation of the former certificate and such evidence as he may deem proper as to the right of the elector to such change.

SECTION 145. Any registered elector who may reside nearer a polling place in a precinct or township than the precinct or township in which he registered, and who desires to vote at such nearer polling place, shall, upon the surrender of his certificate of registration to the supervisor, on or before the first Monday of July preceding the next general election, be entitled to a new certificate permitting him to vote at such nearer polling place; the old certificate to be destroyed by the supervisor and such changes made by him in the registration books as will conform to the general provisions of this chapter. The supervisor of registration may require of the applicant for such change an affidavit or such other evidence as he may deem necessary to a determination of the residence of the applicant.

SECTION 146. In case of the removal of an elector from one residence to another in the same precinct, he shall notify the supervisor and surrender to him his certificate of registration, and the supervisor shall enter the fact upon the registration book and give such elector a new registration certificate in accordance with such change of residence.

SECTION 147. In case of the removal of an elector from one precinct to another in the same county, such elector shall notify the supervisor and surrender his certificate of registration to the said supervisor, who shall enter the fact upon the proper registration book, and shall give such elector a new certificate for the precinct into which he has removed.

SECTION 148. In case of the removal of an elector from one county to another, he shall notify the supervisor of the county wherein he is registered, and shall surrender his certificate of registration; and the said supervisor shall thereupon enter the fact of such removal upon the registration book as aforesaid, and shall give such elector a certificate of transfer to the county to which such elector has removed, upon the presentation of which the supervisor for such county shall cause such elector to be registered in the precinct of such county to which he shall have removed, and shall furnish such elector with a certificate as hereinbefore provided.

SECTION 149. No elector removing from one residence, precinct, parish, ward or county to another shall be allowed to register or vote without a transfer of registration as above provided.

SECTION 150. Every elector shall have the right to a renewal of his certificate without fee or charge, when the same becomes defaced by time or accident, upon his surrendering such certificate so defaced to the supervisor of registration. In case of the loss of any certificate, the elector losing the same shall be entitled to a renewal thereof by the supervisor, upon application and proof of such loss, in the following manner, to wit: He shall at least thirty days before the next general election, make application under oath, setting forth the fact of such loss, and the circumstances attending it, as near as may be, and stating that he has not sold, bartered or parted with the same for any pecuniary, valuable or other consideration, and has not wilfully destroyed the same, which application the supervisor shall examine and consider, requiring other evidence under oath if in his judgment necessary to a determination as to the loss thereof;

and upon such examination and consideration, if the supervisor shall be satisfied that the certificate has been actually lost, he shall issue to the applicant a renewal thereof, marking or stamping the same "renewal." The decision of the supervisor shall be subject to revision by the assistant supervisors together with the supervisor to whom the application is made, in all cases in which he has refused to renew the said certificate. From the decision of the supervisor and assistant supervisors an applicant who has been refused a renewal of his certificate shall have the right of a review thereof by the Circuit Court of the county in in which he was registered: Provided, He give notice thereof to the supervisor to whom he made application for such renewal within five days of the refusal thereof by the supervisor and assistant supervisors and commence proceedings within ten days from the giving of said notice.

SECTION 151. The supervisor of registration shall, immediately preceding each election, revise the registration of electors, and mark off the names of such electors as have died and such as have removed from one residence, precinct, parish, ward or county to another without notifying him and obtaining a certificate of transfer as hereinbefore provided.

SECTION 152. The clerks of the Courts of General Sessions and Common Pleas in the several counties of the State shall, on or before the fifteenth day of October, A. D. 1892, and biennially thereafter on or before the same day, make out and report to the supervisors of registration for their respective counties a complete list of all male persons convicted during the two preceding years, up to the first Monday of October aforesaid, of the following offenses, to wit: Murder, burglary, larceny, perjury or any other infamous crime, or duelling; such report must be accompanied by the certificate of the clerk, under the seal of his office, that the report is correct as appears from the records of his office.

Any clerk of the Court who shall fail or neglect to comply with the provisions of this section shall forfeit and pay to the

county in which he holds his office the sum of fifty dollars for each and every failure so to report.

SECTION 153. Every trial justice in the State shall, on or before the fifteenth of October, A. D. 1892, and biennially thereafter on or before the same day, make out under his hand and seal, and submit to the supervisor of registration for the county in which he holds his office, a certified list of all male persons convicted of petit larceny before him or any of his predecessors, whose trial docket is in his possession, during the two preceding years, or the period following his next preceding report. Any trial justice going out of office shall furnish such list immediately upon his retirement and up to that time, and any trial justice hereafter appointed shall furnish such list from the time of his entry upon the duties of his office. Any trial justice who shall fail or neglect to furnish such report as herein required shall forfeit and pay to the county in which he holds his office the sum of ten dollars for each and every such failure to report.

SECTION 154. The reports provided for in the two preceding sections shall be received by the supervisor as prima facie proofs of the facts stated therein, and he shall immediately erase the names of all such persons from the registration books in his county, and they shall not be allowed thereafter to register or vote in any elections in this State: Provided, That if any such person whose name is so furnished shall present to such supervisor, within sixty days after the next following election, a pardon from the Governor, or, within such time, prove to the satisfaction of such supervisor that he was not convicted of the crime or misdemeanor stated in such certificate, his name shall be restored to the list of registered voters as completely and effectually as if the same had not been stricken therefrom.

SECTION 155. At each and every election the supervisor of registration shall furnish the managers of election with one of the registration books for each precinct, for the care and custody of which the managers receiving the same shall be responsible, and which they shall return to the supervisor of registration

within three days after the close of the election ; and no elector shall be allowed to vote whose name is not registered as provided in this chapter.

SECTION 156. The supervisor of registration is authorized and directed to exchange the registration of such electors as may apply to him for that purpose, from the other precincts to the precincts now established by law, whenever it shall appear to him that the elector so applying resides within a reasonable distance of the same.

City of Charleston—Special Provisions.

SECTION 157. No certificate of registration issued to any elector in the City of Charleston prior to December 24, 1890, shall be good and valid to entitle such elector to vote in any State, federal or municipal election.

SECTION 158. The new set of registration books prepared and completed in pursuance of the provisions of the Act of December 24, 1890, No. 469, by the commissioners appointed under the said act for the purpose, and by them turned over and delivered to the supervisor of registration for the County of Charleston, constitute the original books of registration for said county, so far as the same relate to the voting precincts of the said City of Charleston.

SECTION 159. There shall be in said city but one registration and one set of certificates for all election purposes ; and the revised registration aforesaid and the certificates issued by said commissioners in accordance with the provisions of said act, and those which have since been and hereafter shall be issued in pursuance of the provisions of this chapter, shall be good and sufficient for any election in said city, whether State, federal or municipal.

SECTION 160. At each and every election of mayor and aldermen of the City of Charleston, whether the same be a regular election or one to supply a vacancy or vacancies in any of the said offices, the supervisor of registration for Charleston County

shall furnish the manager of such election with one of the registration books for each such precinct, or with a copy of such book, duly certified by the said supervisor to be a true copy; for the care and custody of which the managers receiving the same shall be responsible, and which they shall return to the supervisor of registration within three days after the close of the election: Provided, however, That in case the supervisor of registration for Charleston County shall fail, neglect or be unable to furnish the managers of such election with the registration books, or with copies of such books, duly certified by the said supervisor as required hereinbefore, in time for any such election, then and in such case, the production by any voter, qualified to vote at such election and offering to vote thereat, of his registration certificate, issued in accordance with law, shall be sufficient evidence of his having been duly registered: Provided, Said certificate of registration shall have been issued on or before the 31st day of May, 1891, by the commissioner appointed under the provisions of an act approved December 24, 1890, and entitled "An Act to amend Part I, Title II, Chapter X, Section 163, of the General Statutes of South Carolina, relating to the location and names of voting precincts, and acts amendatory thereof, so far as the same relate to voting precincts in the City of Charleston, to rearrange the said precincts for all elections, whether State, federal or municipal, and to provide for a revision of the registration of electors in accordance therewith," or by any supervisor of registration for Charleston County since the date last named.

(Copied January 5, 1900.)